Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1591

MELVIN YOUNG, *Petitioner,*

vs.

THE STATE OF TEXAS, *Respondent*

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

Barbara C. Crampton
505 Lamar
Wichita Falls, Texas 76301
Attorney for Petitioner

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No. _____

MELVIN YOUNG, *Petitioner,*

vs.

THE STATE OF TEXAS, *Respondent*

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

Melvin Young, petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in Cause No. 50,935 in the said court entered in this case on January 21, 1976.

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Texas (Appendix A, infra, p. A-1) is per curiam and unpublished.

JURISDICTION

The judgment of the Court below (Appendix A, infra, p. A-1) was entered on January 21, 1976. "Leave to File" Motion for Rehearing was denied (Appendix B, infra, p. A-7) on February 11, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101 (d).

QUESTIONS PRESENTED FOR REVIEW

1. After a state legislature has prescribed probationary supervision as a part of the statutory scheme for probation of sentences and has declared the legislative intent "that the caseload of each probation officer not substantially exceed seventy-five probationers," is the arbitrary refusal by the state courts to require such a standard of supervision a denial of due process and equal protection of the laws under the 5th and 14th Amendments to the Constitution of the United States when the petitioner's probation officer is shown to have a caseload of close to five hundred probationers?

2. Is the petitioner entitled to probationary supervision in the manner prescribed by the state legislature as a part of his right to due process under the 5th and 14th Amendments to the Constitution of the United States particularly when the petitioner has been assessed the maximum monthly fee under the same statute to support such supervision?

3. Is "some showing of a violation of a condition of probation" so vague and indefinite a standard of proof that petitioner is denied due process and equal protection of the laws under the 5th and 14th Amendments to the Constitution of the United States when the state appellate court applied such a standard after noting that a stricter standard of proof could not be applied to the facts of the case?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the Constitution of the United States.

2. The Fourteenth Amendment of the Constitution of the United States.

3. Article 42.12, Code of Criminal Procedure of the State of Texas, entitled "Adult Probation and Parole Law". This statute is the only authority for probated sentences in felony cases in the State of Texas. Particular attention is called to the following portions of the statute:

> Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power,[1]

[1]Cf. Almost verbatim phraseology of 1925 Federal Probation Act, quoted in *Riggs v. United States* (C.C.A. 4) 14 F.(2d) 5 (1926):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have the power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or imprisonment, to suspend the imposition of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: Provided, that the period of probation, together with any extension thereof, shall not exceed five years."

Query: What standard of proof does such language require for revocation?

after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. * * *

Sec. 6 a. (a) A court granting probation may fix a fee not exceeding $10 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation * * *

Sec. 10. For the purposes of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in the county or counties, if applicable, are authorized, with the advice and consent of the commissioners court as hereinafter provided, to employ and designate the titles and fix the salaries of probation officers, and such administrative, supervisory, stenographic, clerical and other personnel as may be necessary to conduct presentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of probation. * * *

It is the further intent of this Article that the caseload of each probation officer not substantially exceed seventy-five probationers. * * *

STATEMENT OF THE CASE

On March 16, 1972, petitioner pled guilty in the 30th District Court of Wichita County, Texas to an indictment charging him with the offense of burglary with intent to commit theft that was alleged to have occurred on December 4, 1971. Petitioner was placed on probation for six years. (R.O.A. 174-5 and R.O.A. 13 and 14).

On October 31, 1974, the State of Texas filed a motion in the same district court to revoke petitioner's probation. (R.O.A. 17). An amended motion was filed for this same purpose on November 19, 1974. (R.O.A. 21). After hearing on the motion to revoke began on November 27, 1974, the State made at least two "trial amendments" to its pleadings. (R.O.A. 41 and 61-62). As the violations were finally read orally by the prosecuting attorney in court, they may be summarized as follows (R.O.A. 68-70):

1. Appellant violated the first term of his probation by violating the law on September 12, 1974 by:
   (a) posession of a .410 gauge shotgun, and
   (b) possession of a machete
   (c) eluding a police officer
2. Appellant violated the 9th term of his probation by failing to report to his probation officer on 19 specified months.
3. Appellant violated the 12th term of his probation by paying only $11.60 on court costs of $63.50.
4. Appellant violated the 13th term of his probation by paying only $37.00 in probation fees leaving $248.00 in arrears.

Although petitioner contested the sufficiency of the proof of every element sought to be proved by the State at the revocation hearing, his main attack at the hearing, in the nature of an affirmative defense, was based upon the lack of probationary supervision. See Appendix C, infra, p. A-8, for summary of facts concerning this lack of probationary supervision in petitioner's case with references to testimony in the record.

The crux of this defense is that the probation officer had close to 500 probationers assigned to him in spite of the declaration of the Texas legislature that the caseload of a probation officer should be limited to substantially 75 probationers. Further, that as a direct result of this caseload, petitioner had received no semblance of probationary supervision by the probation officer or anyone else since the day of his conviction except for administrative accounting for the $10 per month probation fee. (See Appendix D, Testimony of Officer Plummer, infra, p. A-25, cross-examination).

At the conclusion of the hearing, the trial judge found the petitioner had "violated the terms of his probation as set forth". A written order, entered on the same day, found all of the above allegations as violations except that money due on court costs and probation fees was found merely to be "failed to pay as directed." (R.O.A. 30).

Petitioner complained in his brief filed in trial court on appeal that the trial judge abused his discretion in revoking petitioner's probation because petitioner received no probationary supervision while he was

required to pay a monthly fee for something he did not receive. See Appellant's Ground of Error No. One in Appellant's brief below.

The per curiam opinion of the Texas Court of Criminal Appeals ignored and avoided the constitutional questions of due process and equal protection of the law that we raise here[2] with the statement, "It is indeed regrettable that the Probation Office of Wichita County is so overworked and understaffed." (Appendix A, infra, p. A-5).[3]

It will be observed that the opinion of the Court of Criminal Appeals points out that the State conceded on appeal that the trial court abused its discretion in finding that the appellant violated the terms of his probation by failing to pay the court costs and probationary fees assessed. (Appendix A, infra, p. A-2). However, such a disposition does not appear to us to render petitioner's complaint of a denial of due process and equal protection of the laws because of the absence of probationary supervision moot.[4]

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[2]As a general proposition of law, when a right is given by a state legislature (i.e., probationary supervision), even though it is not a right guaranteed by the federal Constitution, the arbitrary denial of that right violates the Fourteenth Amendment. See *United States v. Illinois* (C.C.A. 7) 521 F. 2d 717 (1975). See also *U.S. v. Bensinger*, 322 F. Supp. 784 (N.D. Ill. 1971). See also *Myers v. Parkinson* (E.D. Wisconsin) 398 F. Supp. 727 (1975).

[3]Parole officers are generally overworked and inadequately funded. See concurring opinion of Chief Justice Lumbard in *United States v. Fitzpatrick* (C.C.A. 2) 426 F. 2d 1161 (1970).

[4]This appears to be a novel complaint. A statutory scheme to support costs of probationary supervision by assessment of a periodic fee to be paid by the probationer in the manner of Section 10 of the Texas Statute, supra, is not novel. However, we are unable after diligent search to find that an appellate court has considered the questions of whether the failure to provide probationary supervision after assessment

The next to last paragraph of the per curiam opinion of the Texas Court of Criminal Appeals held that "some showing of a violation of a condition of probation"[5] was the standard of proof required in Texas in a revocation of probation case.[6] The opinion of the Court of Criminal Appeals does not cite any authority other than its own to support such a standard.[7] The looseness of the phrase "some showing of a violation" is uncertain to apply because it can mean different things to different judges with resulting

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of such a fee is a denial of due process or equal protection of the law under the Constitution of the United States. For example, does the fact that petitioner was assessed the maximum statutory fee of $10 a month entitle him to any more or any less "probation services" than another probationer? Note that the record in this case narrows the question even further. Does the assessment of such a fee entitle petitioner to any "probation services", or is it that the support of an administrative appendage to the criminal trial court is a burden that a probationer cannot complain about when "services" are not rendered in the manner prescribed by the legislature?

[5]The absence of this definition in haec verba in the cases cited by the Court of Criminal Appeals raises a question of whether this is an unforeseeable construction so as to deprive petitioner of fair warning under the principle declared in *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed. 2d 52 (1973).

[6]This standard is not as clearly established in Texas as the per curiam opinion suggests. See the dissenting opinion of Presiding Judge Onion in *Kelly v. State* (Tex.Cr.App.) 483 SW 2d 467 (1972). This dissent pointed out that a trial court abused its discretion in revoking probation when it used a standard of proof less than "beyond a reasonable doubt", and argued that there could not constitutionally be two standards of proof in "a critical stage of the criminal process" without abuse.

[7]A typical standard in revocation of probation proceedings is that the state may prove a violation of probation on a "preponderance of the evidence". See 21 Am.Jur. 2d, Criminal Law, Section 568. Also see *State v. Fortier*, Or.App., 533 P. 2d 187 (1975); *People v. Witherspoon*, Ill.App., 292 N.E. 2d 202 (1972).

unequal application of the laws.[8]

Petitioner submits that "some" evidence cannot be distinguished from "substantial" evidence or "scintilla" of evidence with sufficient certainty to assure equal application of the laws to all parties in the same situation.[9]

CONCLUSION

Writ of Certiorari should issue to the Court of Criminal Appeals of the State of Texas to determine whether petitioner has been deprived of his rights to due process and equal protection of the laws under the 5th and 14th Amendments to the Constitution of the United States.

Repectfully submitted,

Barbara C. Crampton
505 Lamar
Wichita Falls, Texas 76301
Attorney for Petitioner

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[8]Other courts have upheld standards fully as loose. See *Manning v. United States* (C.C.A. 5) 161 F. 2d 827 (1947) which held that under the federal statute, "All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation." See *Bernhardt v. Florida*, Fla., 288 So. 2d 490 (1974) which held "evidence upon which to predicate revocation introduced at hearing must be sufficient to satisfy conscience of the court." See *State v. Caron*, Me., 334 A. 2d 495 (1975) which held "exercise of discretion will be informed by accurate knowledge of probationer's behavior."

[9]Note that a findng of "no" evidence does not contain such an uncertainty. See *Thompson v. Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624, 80 *ALR* 2d 1355 (1960). This ALR annotation also points out the difficulty of "some" evidence as a quantum of evidence at p. 1368.

APPENDIX A

MELVIN YOUNG, Appellant

NO. 50,935 VS.

THE STATE OF TEXAS, Appellee
Appeal From WICHITA County

OPINION

This is an appeal from an order revoking probation. Appellant pleaded guilty to the offense of burglary on March 16, 1972 and received a six-year probated sentence. A motion to revoke probation was filed on October 31, 1974 alleging that appellant committed an offense against the laws of the State of Texas by unlawfully carrying a weapon, to-wit: a knife, or machete, having a blade over 5½ inches in length. The motion also alleged that appellant failed to report regularly, failed to pay court costs which had been assessed against him, and failed to pay his probationary fees, all in violation of the terms of probation. On November 19, 1974, the State filed an amended motion to revoke including the above allegations and adding that appellant also committed the offense of eluding a police officer. Over appellant's objections, the State orally amended its motion to revoke just prior to the hearing thereon, on November 27, 1974, adding the additional allegation that appellant had committed the offense of unlawful possession of a firearm by a felon. After the November 27 hearing, the court entered its order from the bench revoking appellant's probation on the grounds set forth in the State's motion to revoke.

The evidence indicated that officers Yates and Franks of the Wichita Falls Police Department observed appellant travelling at a high rate of speed in a 1965 Chevrolet pickup truck around 10:15 p.m. on September 12, 1974. The officers gave chase and appellant's speed was clocked at 50 m.p.h. in a 30 m.p.h. zone and he was observed to run a red light. The officers were able to pull him over some five or six blocks later. Appellant got out of his truck immediately, leaving the driver's door open. Looking into the pickup truck, Yates observed the handle of a machete under the driver's seat, easily accessible to the appellant. After placing him under arrest for unlawfully carrying a weapon, the officers searched the pickup and discovered some .410 gauge shotgun shells, some .38 calibre pistol cartridges, and a loaded .410 gauge shotgun.

The evidence also indicated that appellant had failed to report to his probation officer at least eighteen months out of the thirty-two months he had been on probation. Appellant's arrearages in court costs and probation fees, however, were paid by his attorney after the motion to revoke was filed but prior to the hearing.

Appellant challenges the sufficiency of the evidence to support each of the court's findings that appellant violated the terms of his probation in the five respects alleged and found by the court. Such findings must be based on a preponderance of the evidence. Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974).

The State concedes that the court abused its discretion in finding that the appellant violated the terms of

his probation by failing to pay the court costs and probationary fees assessed. There is also a question whether appellant was in violation of V.T.C.A., Penal Code, Sec. 46.05 by carrying a shotgun. Whether burglary with intent to commit theft is a violent crime for purposes of Sec. 46.05 has never been determined; nor has it been determined that the felony conviction activating the terms of Sec. 46.05 need be a final conviction. Appellant also makes a dubious claim that the direction to report to his probation officer "once each 30 days or as directed . . ." was an unauthorized delegation of authority by the convicting court under McDonald v. State, 442 S.W.2d 386 (Tex.Cr.App. 1969). We need not address these questions, however, since the evidence is sufficient to support the trial court's findings on the other two grounds urged for revocation.

Appellant contends that the machete found in his truck was too rusty and blunt to be used for any "cutting or stabbing," thereby placing it outside the definition of "illegal knife" contained in V.T.C.A., Penal Code, Secs. 46.01 (6) and (7). The evidence indicated, in fact, that the machete was used by appellant in the course of his work to knock out windows of junked cars. The instrument was nevertheless in evidence before the court and the court was the sole trier of the facts, the credibility of the witnesses and the weight to be given their testimony. Ross v. State, 523 S.W.2d 402 (Tex.Cr.App. 1975). We cannot say that the trial court abused his discretion in concluding that appellant had committed an offense by carrying the weapon.

The evidence that appellant eluded police officers on

September 12, 1974 is likewise confusing. The chase could not be characterized as "high speed" and the evidence showed that the siren on the police vehicle in closest pursuit of appellant was inoperative. Nevertheless, appellant proceeded five or six blocks, speeding and running one red light, and making one turn while being pursued by two marked police cars with red lights flashing and the siren on one police vehicle blaring. Though conflicting inferences might be drawn, there is ample evidence from which the court, as the sole trier of the facts, could conclude that appellant had attempted to elude police officers. Ross v. State, supra. No abuse of discretion is shown.

Appellant next complains that the State was erroneously permitted to amend its motion to revoke orally, immediately prior to the commencement of the revocation hearing. Appellant contends that he did not have enough time to prepare a defense to the amended motion and on this basis he objected strenuously. The oral "trial amendments" complained of added the allegation that appellant had committed the offense of possession of a firearm by a felon and specified the months during which he had failed to report to his probation officer. While it appears that the amendments were necessary to give appellant notice of the charges, Graham v. State, 502 S.W.2d 809 (Tex.Cr.App. 1973), and that a delay would have been appropriate to allow him to prepare his defense, Franks v. State, 516 S.W.2d 185 (Tex.Cr.App. 1974), fn. 3; Kuenstler v. State, 486 S.W.2d 367 (Tex.Cr.App. 1972), no harm is shown here. As noted above, neither of the amended grounds for revocation was necessary to support the court's

order revoking probation. Appellant had ample notice of the alleged "illegal knife" and eluding a police officer charges, and these offenses were sufficiently shown to support the revocation of appellant's probation.

Appellant makes the novel complaint that the trial court abused his discretion because the prosecutor abused his discretion in failing to dismiss a pending charge against appellant. In April of 1973, appellant's wife filed a complaint with the district attorney's office alleging that appellant had stolen her automobile. After a reconciliation, the district attorney would not permit her to drop the charges. This becomes material in light of the apparent policy of the probation office not to recommend reduction or termination of the term of probation under Art. 42.12, Sec. 7, V.A.C.C.P. for any probationer who had a charge pending against him. How the prosecutor's decision in April of 1973 reflected on the exercise of the court's discretion in November of 1974 to revoke probation, however, is a mystery to us. This ground of error is completely without merit.

Another ground of error urged by appellant is that he did not receive any supervision from the probation office of a "probable reformatory character." Appellant went to great length to develop the record on this lack of supervision issue and has argued it exhaustively in his brief. It is indeed regrettable that the Probation Office of Wichita County is so overworked and understaffed. As this Court said in Mullins v. State, 464 S.W.2d 669 (Tex.Cr.App. 1971), however,

"The lack of supervision does not justify a viola-

tion of the law or the failure to live up to the terms of probation."

The attempts by appellant to distinguish *Mullins* in his brief are without merit. This ground of error is overruled.

Finally, appellant contends that the trial court erred in revoking his probation because same was not shown to have been "in the best interests of society." The probation law, Art. 42.12, Sec. B, V.A.C.C.P. makes it clear throughout that the determination of what is in the best interests of society is for the trial court alone to make. As appellant points out, however, this Court has said that the trial court does not have absolute discretion arbitrarily to revoke probation. Campbell v. State, 456 S.W.2d 918 (Tex.Cr.App. 1970); Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974). The limitations suggested by *Campbell* and *Scamardo*, however, related only to the requirement of some showing of a violation of a condition of probation. That showing has been made in this case. We know of no better office in whom to vest the determination of "the best interests of society" than that of the trial judge and have been shown no authority that would indicate otherwise. Certainly this Court cannot conclude in the instant case that the trial judge abused his discretion in this regard.

The judgment of the trial court revoking appellant's probation is affirmed.

PER CURIAM

(Delivered January 21, 1976)

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, Feb. 11, 1976

Dear Sir.

I have been instructed to advise that the Court has this day denied "Leave To File" the appellant's Motion for Rehearing in Cause No. 50.935, Melvin Young

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,
GLENN HAYNES, Clerk

APPENDIX C

PETITIONER'S SUMMARY OF FACTS CONCERNING LACK OF PROBATIONARY SUPERVISION WITH REFERENCES TO THE RECORD ON APPEAL OF THE COURT OF CRIMINAL APPEALS

1. The probation officer had close to 500 probationers assigned to him. (R.O.A. 141)
2. The probation officer could not see all of his probationers in a month if he gave each one of them only 10 minutes time. (R.O.A. 141, line 23)
3. Appellant was not expected to report on a particular day in the month. (R.O.A. 142)
4. Probationers could call in instead of coming in, but some days "he might call all day and not be able to make it through." (R.O.A. 143)
5. The Probation Department did not give any help to Appellant in securing work because the probation office did not do that. (R.O.A. 144)
6. The probation officer occasionally went out to see a probationer, but he never went out to see Appellant. (R.O.A. 143, lines 5-6)
7. The probation officer never wrote Appellant. (R.O.A. 144)
8. The probation officer never called Appellant. (R.O.A. 144)

9. The probation officer never notified Appellant when he was eligible for release from probation. (R.O.A. 145)
10. The probation officer generally never filed a revocation for failure to report unless he was brought to the officer's attention by committing another offense. (R.O.A. 145)
11. The probation officer did not initiate the revocation in Appellant's case. (R.O.A. 145-146)
12. The probation officer knew very little about Appellant's literacy or schooling. (R.O.A. 149)

APPENDIX D

* * * * *

MR. WALTER PLUMMER was called as a witness by the State, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. AMMONS:

Q State your name.
A Walter Plummer.
Q Your occupation?
A Assistant Probation Officer, Wichita County.
Q How long have you been so employed?
A About four years.

MRS. CRAMPTON: Just a minute, Your Honor. I'm still going to object to this. It is clearly out of order on this thing and I should be entitled to have my motions heard before a motion for trial amendment—

THE COURT: Well, first we are going to hear the preliminary motion for a trial amendment and if I permit that, we will go ahead. If I don't admit it, there won't be any point in hearing anything else at this time.

BY MR. AMMONS continued:

Q You testified—Would you repeat how long you have been so employed?
A Almost four years.
Q Now, are you acquainted with defense counsel in this case, Barbara Crampton?
A Yes, I am.
Q Would you tell the Court where your offices are located?

A In the basement of the courthouse.
Q Now, let me direct your attention to—I can't remember the exact date—but let me ask you, do you keep certain records of your probationers?
A Yes, sir.
Q Did you have a record of one Melvin Gene Young?
A Yes, sir.
Q Do you have that record with you?
A I have.
Q Without going into the details of what the records themselves would contain in regards to any case on revocation, would your records reflect whether or not this defense counsel, Barbara Crampton, ever on or about a day or so ago came to your office?
A Not a day or so ago, no.
Q Would your record reflect when she did come to your office?
A I might have made a notation.—Yes, on the 20th of November.
Q Mr. Plummer, is it your general practice in the course of business as a Probation Officer when you receive certain information on violations which have been committed by some of your probationers, does a certain file request or a motion to request to revoke probation?
A Yes.
Q Did you have one in that particular file?
A Yes, I have right here on top.
Q Did you have it on that date in question on which Mrs. Crampton came to see you?
A Yes. It has been in this file since the 29th of

October, 1974.

Q You say you do have that particular request with you at this time?

A Right here.

Q Okay. Would you tell the Court whether or not on the date in question when Mrs. Crampton came to your office whether or not you have any personal knowledge as to whether or not she—or did you have any conversation between you and Mrs. Crampton in regard to that request to revoke?

A There was a discussion about the revocation order, yes.

Q Would you read for the Court the—Well, let me ask you, does that motion contain, or request contain any particular allegation in regard to unlawful possession of a firearm by a felon? In violation of Term Number 1 in the terms and conditions of probation?

A Would you like for me to read the violations I have written here?

Q Yes, if you would.

A "Term No. 1: On or about September 12, 1974, possessed a firearm to-wit: a 410 gauge shotgun. This is a violation of Term No. 1 in as much as 'possession of a firearm by felon.' "

Q All right. Mr. Plummer, would you tell the Court whether or not you can recall any conversation you had with Mrs. Crampton in regards to that particular allegation, if you can recall?

A I don't recall the exact wording. I think that we discussed both the shotgun and a machete which I have not put in here.

Q Would you tell the Court whether or not her attention was concentrated on the allegation regarding the 410 gauge shotgun?

MRS. CRAMPTON: We will objec to that. It's speculative and so on.

THE COURT: Object to the question about the 410 gauge shotgun in what aspect?

MRS. CRAMPTON: Well, he said would he tell the Court whether or not my attention was focused on—

THE COURT: Sustained.

Q Would you tell the Court whether or not she asked you any questions or made any statements in regard to that particular allegation?

A I don't recall any particular question but it was discussed about the shotgun and it was discussed about the machete— and I can't recall any exact wording.

Q Would you tell the Court again what date this occurred?

A Yes, sir. I think I said the 20th. It was the 20th of November.

MR. AMMONS: Pass the witness, Your Honor.

CROSS EXAMINATION

BY MRS. CRAMPTON:

Q Mr. Plummer, when you prepared that complaint did you prepare that upon your own initiative, or were you directed to prepare it by someone?

A I was requested to prepare two complaints at that time, one on Marshall Fleeks and one on Melvin Young, inasmuch as Mr. Fleek was accused—

Q Excuse me just a minute. Let's leave out anything about Marshall Fleeks—

A All right.

Q —because he's really not involved here.

A Well, Mr. Young was accused of having a shotgun in his possession and a machete, and that the District Attorney's office was contemplating revoking the probation and wanted me to write up the request for revoking, so I did so.

Q So, you did it at their request, is that what you are saying?

A Well, they notified me to do it. The procedures are that I write up the request and then they make the motion and then we have a hearing.

Q All right. Now, when you made up this request, this complaint—

A Yes, ma'am.

Q Where did you get your wording for the section you read a minute ago, to the effect that he had committed the offense of being a felon in possesion of a firearm?

A Well, usually—I have said I would never use that word in court again but I almost—I'm going to say this, that when motion to revoke was brought to my attention—

Q I beg your pardon—

A When the motion to revoke was requested—

Q Okay, before the complaint then?

A Before I had written the complaint—

Q All right.

A I asked for the legal terms in which to write it be-

cause I am not an attorney and so, it was a violation of Term No. 1, and—

Q Who did you receive those legal terms from?

A From Mr. Ammons—unlawful possession of a firearm, a 410 shotgun, on or about the 12th of September.

Q All right. Now, in other words, you wrote basically what he told you to as far as the words went—

A Well, I—

Q As far as the legal terminology?

A I did because I'm not familiar with the legal terminology and I must write these up so that they are understandable.

Q Would you trace what happened to this complaint after you drew it? Tell me what happens next?

A Oh, I drew up the complaint and took it upstairs, after I Xeroxed myself a copy, I took the original to the District Attorney's office and I assume that they—someone in there wrote up a Motion to Revoke, and after the Motion to Revoke is made, it is my belief that it goes to a Judge for signing and then to the clerk for filing.

Q Do you know where the original of your complaint would be?

A Probably in the District Clerk's office. I am not certain.

Q Do you think it would be filed in the papers?

A It might be in the shuck there somewhere.

MRS. CRAMPTON: Your Honor, I don't believe it is. I don't believe that the original complaint is filed. We would ask that Mr. Plummer's copy of it

be introduced, entered of record, as Defendant's Exhibit No. 1.

Do you have any objections, Mr. Ammons?

MR. AMMONS: No, I don't have any objection.

THE COURT: Admitted.

(Request for Motion to Revoke
(from Mr. Plummer's file was
(admitted in evidence as Defend-
(ant's Exhibit No. 1, a copy of
(same appended hereto.

Q Mr. Plummer, did you know before the conversation that you and I had on November 20th, that the Motion to Revoke itself read, instead of the Term 1 that you read there, that Term #1 read: "Committed the offense of unlawfully carrying weapons in Wichita County, Texas, Sec. 46.02 Texas Penal Code in that on or about September 12, 1974, Defendant had in his possession an illegal knife, to-wit, a machete having a blade of over 5½"?

A Prior to your conversation with me on the 20th of November, I didn't know how the Motion to Revoke read. All I knew was my request for motion to revoke.

Q And this Motion to Revoke was prepared, was it not, by someone in the District Attorney's Office?

A It would have to be, yes, ma'am.

Q So, they were cognizant from the time of the first complaint that you made, if not before, that they had these two potential charges, if they so desired to include them—the one that they actually put in and the one that you had in yours, based upon the

direction from Mr. Ammons, as to the legal terminology? Right?

A You say "they" knew this?

Q Yes.

A Well, I don't—

Q Well, you know they know of the one that you had?

A Yes.

Q Because they did it—I mean, they gave it to you, right?

A Right, yes.

Q Okay. And then on the Motion for Revocation that was signed by Mr. Ammons, so he in theory at least should know what his own motion said?

A Yes.

Q So, they were cognizant of both of these at least on the 31st of October, were they not?

A This would be my assumption, yes, ma'am.

MRS. CRAMPTON: Pass the witness.

MR. AMMONS: I have no questions.

THE COURT: You may step down.

(WITNESS EXCUSED)

THE COURT: The Court will grant the trial amendment. Now, I will hear Mrs. Crampton's preliminary motions.

MRS. CRAMPTON: Note our exception, Your Honor, to the ruling on the trial amendment.

We would like first to take up our Motion for Discovery and Disclosure. Let me state to the Court that earlier—I'm not sure exactly what day—I discussed this matter with Judge Kirk, be-

cause I was going to be at the police station, Monday, I believe it was—and I have examined the weapons that are a part of Article 2. In other words, without a really formal hearing on it. Part 2 of that has actually been granted by it having happened. And then—

THE COURT: The physical objects examination?

MRS. CRAMPTON: Yes, sir.

MR. AMMONS: Your Honor, would that include the shotgun?

THE COURT: Yes.

MR. AMMONS: You have seen the shotgun?

MRS. CRAMPTON: It wasn't that I asked to see the shotgun. It was that the shotgun was attached to the machete.

MR. AMMONS: You have seen it though and examined it?

MRS. CRAMPTON: Well, I didn't examine it but it was there.

MR. AMMONS: Okay.

* * * * *

MR. WALTER PLUMMER was recalled as a witness by the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AMMONS:

Q State your name, please.
A Walter Plummer.
Q Your occupation?

A Assistant Probation Officer of Wichita County.
Q How long have you served in that capacity?
A Almost four years.
Q Would you state your general duties as Probation Officer of Wichita County, Texas.
A To supervise adult persons placed on probation in Wichita County.
Q Do you keep certain records on your probationers?
A Yes, sir.
Q I will direct your attention to on or about the 16th day of March, 1972, and I will ask you whether or not you received any probationer on that date?
A Yes, sir. I did on the 16th of March because—
Q The answer to that question is "yes"?
A Yes, sir.
Q Would you tell the Court who that was?
A It was Melvin Young.
Q Do you see that individual, Melvin Young, the individual you just referred to, in this courtroom today?
A Yes, air.
Q Would you point him out to the Court, please?
A Yes, sir, sitting at the counsel table by Mrs. Crampton.

MR. AMMONS: Your Honor, may the record reflect this witness has identified the Defendant in this cause?

THE COURT: Yes.

Q Mr. Plummer, let me direct your attention to that date when this Defendant came to your office. Did you receive anything from him?

A Yes, sir. I received two copies of a judgment of Probation, one of which he was to retain and one which I have for my file.
Q Would you tell the Court the Cause Number reflected on that Judgment—both Judgments of Probation?
A 15,469-A.
Q And would you read the style of the case?
A Yes, it was burglary.
Q State of Texas versus who?
A State of Texas versus Melvin Young. I'm sorry.
Q Would you tell the Court what, if anything, you did after the Defendant reported to you, having been placed on probation?
A You mean as a probationer?
Q As a probationer, your first visit?
A We sat down and the first thing I do is to make out a fact sheet or an information sheet on the new probationer, and I treated Mr. Young in the same manner.
Q Now, let me interrupt you. You stated it is your policy to keep certain records on each of your probationers, is that correct?
A Yes, sir.
Q Did you indeed make a record and keep records on this probationer?
A Yes, sir.
Q Did you begin at that time to make and maintain a record on this particular Defendant?
A I did.
Q Okay. Would you continue your answer to my question in regards to what, if anything, you did

on the first visit of this Defendant?
A All right. The first thing I make a cover sheet or information sheet which consists of four pages, and I always fill out the three pages, and the last page is--
Q Well, let me ask you more specifically did you do anything in regards to the terms and conditions of probation as listed in this Judgment of Probation which he handed you on that date?
A After having made out the information sheet, we sat down and I asked him if he had gone over the terms of probation with his counsel.
Q Well, let me ask you this question—Do you recall asking him that question?
A I always ask each new probationer that question, and if they have not gone over them, I do. I sit there myself and go over them.
Q Will you tell the Court whether or not you recall his response to that question?
A I don't recall his response to it, sir, but—
Q Well, let me ask you this—Did you at that time go over with this Defendant the various terms and conditions of his probation?
A I know that I did because I circled the two amounts here, the court costs and the probation fee, and when I circle any item on this page I have covered that term of probation.
Q As you did so, did the Defendant have a copy?
A Yes, sir, he did. He had his copy.
Q Did you observe the Defendant as you were having this conversation as to the terms? Did you have occasion to observe him?

A I would look up occasionally, but I don't recall.
Q Did you ask—Did he ask you any quections as you went down the list as to whether or not he had any problem understanding what that particular term would be?
A No, I don't think he had any misunderstanding.
Q Now, would you tell the Court, from your records, what your records reflect his payment of court costs? How much court costs was he ordered to pay under that Judgment of Probation?
A He was ordered to pay $63.50 in court costs.
Q And how much and when do your records reflect he paid anything?
A Mr. Young paid $3.00—He's paid up on his court costs.
Q Now, you say he is paid up—
A Yes, sir.
Q What date does that indicate?
A Well, he made a payment the 10th of April, of 72.
Q How much did he pay?
A $3.20.
Q All right.
A And the 16th of May of 72, $3.20; the 14th of June of 72, $3.20; and on the 13th of September, $2.00.
Q Was that in 72?
A This was in 72, yes, sir. And final payment was made the 20th of November, this year.
Q You say final payment, who made that payment? Did the Defendant make that payment?
A Well, it was made for him because he was in custody.
Q Who made the payment? Did the Defendant report

at that time and make the payment?
A No, sir, he didn't report.
Q Well, who made the payment?
A His attorney.
Q Now, would you tell the Court the time span between the last payment made by the Defendant and by Mrs. Crampton on that date?
A From the 13th of September of 72 to the 20th of November, 74.
Q Let me direct your attention to the probation service fee. How much do your records show that he should have paid and has paid, and when?
A Well, I would repeat the same dates, $8.00 each time that he paid on those same particular dates up until April of 74, he came in and made a $5.00 payment, and then again the 20th of November, it was brought up to date, $215.00.
Q Now, all of this court costs and probation service fee was paid off when?
A When it was brought up to date?
Q Yes, when it was brought up to date.
A The 20th of November, 1974.
Q And what was the date which you filed your original request to revoke, do you recall?
A It was—
Q Was it prior to November 20th, 1974?
A Yes. In fact, it was in October, I believe.
Q Let me direct your attention to term number 9, as far as reporting. Would you tell the Court what your records reflect in regards to the reporting to you monthly by this Defendant, and would you tell

the Court when he reported and when he did not report?

A Yes. These are the report sheets here, and he reported the 10th of April, 72; are 16th of May, 14th of June, 12th of July, 18th of August, 13th of September, and 30th of October, of 72. Then we came to the year of 73 and it shows the 24th of May, 15th of June, 23rd July, 1st of October; and for the year of 1974 was—Well, I have only entered April for 74, I don't know what date, and August of 74.

Q Could you right quick for the Court tell the Court so that he may get a better understanding, how many times he reported and how many times he should have reported during the probationary period, up to date, up to this date?

A He reported 12 times during the time that he was on probation, and from March of 72 to 74 is 24 months, and it would be 32 months, 32 reports he should have made, had he reported in November.

Q All right. Now, do your records reflect—or is it your policy to ascertain whether or not a probationer when he comes into your office is employed?

A Yes.

Q Do your records indicate employment by this individual?

A Yes, he was employed. When he came to my office the first time he was employed at Sears Roebuck and Company, and he was mowing yards and trimming and doing landscaping work.

Q Do your records reflect in 1973 the employment status of this defendant?

A He was unemployed because on the 14th of June of 72 when he did report he reported to me that he had injured his back on his last job and was not working.

Q Did he indicate to you at that time whether or not he had received any workmen's compensation benefits?

A No, he did not.

Q Or whether or not he had filed for any?

A No.

Q In 1974, do your records reflect his employment status?

A I don't show any employment.

MR. AMMONS: I will pass the witness.

CROSS EXAMINATION

BY MRS. CRAMPTON:

Q Mr. Plummer, how many probationers do you have?

A Close to 500.

Q Close to 500?

A Yes, ma'am.

Q And how long does it take to talk to one each time you see a probationer, roughly?

A Anywhere from five minutes to sometimes as much as thirty minutes. However, if you want a time schedule on this, you would have to understand that a large percentage of my probationers are out of town now and they have to mail their reports and so forth and these I may have after duty hours.

Q I see. The real point that I was trying to find out here was if you had enough time during a month to give each probationer fifteen minutes?

A If I were to physically see each probationer, there is no way I could make it.

Q About how much time would you be able to give a probationer, based upon how many you have and how many working hours?

A I'm sorry—

Q I was wondering if you had ever figured out how much time you spent with each probationer.

A No, I had not stopped to figure it out. Even if I only gave each of the 500 ten minutes, I couldn't make it in a month's time.

Q Now, of course when you have a day like this when you spend the whole day up here, that really blows your schedule, doesn't it?

A Yes.

Q What happens to those probationers who came in today?

A Those that came in today, I have their reports on my desk down there right now. They are stacked up right now and they make their monthly probation service fee and other court costs, necessary payments, to the girl in the front office.

Q Do you know whether or not that you have some that for whatever reason come to make their report today and when you are not available, just try to come back another day?

A For them to come back another day, yes, ma'am.

Q And do you also know if you have some that try to

call you to tell you if they have been delayed or anything?

A Yes, I have received numerous calls that they are unable to make it in on time, such as this case here, it was agreed that he would report between the 10th and 20th each month and this gives them ten days in there to report in and if they cannot make it in that length of time, they generally call to let me know they will be late.

Q Do you know or do you have any record of telephone calls from Melvin Young when that occurred?

A I have no record of a call of that nature, no, ma'am.

Q Do you have any record of his attempting to call when he didn't get through?

A Now, this I couldn't say. As you know, our lines down there are limited and with people calling all the time, he might call all day long and not ever be able to make it through.

Q Now, do you go out and see your probationers?

A Occasionally.

Q Did you ever go out and see Melvin?

A No.

Q Do you happen to know was he hospitalized at the time he had this bad back?

A I don't know whether he was hospitalized or not. I don't recall our conversation, except that he was not employed because he had injured his back.

Q About what date was that?

A That was on the report on the 14th of June, of 72. Now, he reported on that date. Between the 16th

of May of 72 and the 14th of June 72, was the time he had injured his back, somewhere in that period.

Q Do you know was he ever able to obtain regular employment again? Do you have any record at all on that?

A As far as my records indicate, he was not on regular employment since then.

Q Was the Probation Department able to give him any assistance along these lines?

A No. I do refer people when they ask for assistance. I refer them to Mr. Hogan, with the Texas Employment Agency, and send them up to the agency on Eleventh and Austin.

Q Is that the Texas Employment Office?

A The Texas Employment Office.

Q Up at their standard office?

A Yes, ma'am.

Q And this one on 7th and Travis is more or less for transient people?

A That is the labor office.

Q And as a general thing, as a matter of fact, the labor office is a sort of strong back office, is it not?

A This I am a little hesitant to send people to. I think Melvin is a little higher caliber man than that.

Q The real question I had was whether or not the office on Seventh Street did not use mainly unskilled labor?

A Yes, they do use unskilled labor, laymen.

Q Do your records reflect that you wrote to Melvin?

A I don't have anything listed here where I have written to him, no.

Q All right. Would it reflect that you called him, or

that you did call him?

A No.

Q Can you testify whether or not there would have been anything about on—say in March or April of this year, where Melvin would have been notified in any fashion that, given the proper set of circumstances, he could get off of probation?

A Well, at the time of his coming in as a new probationer, it was explained that any man placed on probation under Texas legislation is eligible for dismissal either at the expiration of ⅓rd of his sentence or two years, whichever is less, if he meets the probation fees and reports as he is required to, and if the Court sees fit—

Q The question I was really asking you if in March or April of 74, that would have been brought to his attention?

A Yes, ma'am, had he come in.

Q No, Mr. Plummer, I am just asking you if it was not and if it could have been, if it was brought to his attention, as far as you know?

A No, ma'am.

Q All right. Do you customarily prepare complaints to revoke probation based upon failure to pay probation service fees?

A As long as the man is making them, no.

Q Do you customarily prepare complaints to revoke probation, based upon failure to report?

A Yes, ma'am.

Q Do you do that on your own initiative?

A Generally, I give the man a chance. As you can see by this record, you can miss several months and

until it comes to my attention he is further violating his probation by any other—by committing another offense.

Q Now, let me return to your complaint. At this point, it is my understanding that you did not recommend to the District Attorney's Office first this revocation, that the beginning of it was initiated by the District Attorney's Office?

A It was suggested that I make a request for a motion to revoke by the District Attorney's Office because of the offenses, and after reflecting through the record that he had not reported regularly or paid on his probation regularly, that certainly I had to agree that we had to take action.

Q In effect you are saying that while you did not recommend it, would you say that you did or did not desire that motion for revocation to be filed?

A Well, I can't say my desires. I didn't—I had no feeling either way in that manner.

Q Did you oppose it when the District Attorney's Office suggested it?

A Did I oppose it?

Q Yes.

A No, ma'am, I didn't.

Q Now, would you tell us what a machete was originally used for?

MR. AMMONS: Your Honor, again I object to this question as being immaterial and irrelevant in this cause.

THE COURT: Objection sustained.

MRS. CRAMPTON: Note our exception.

Q Do you know of your own knowledge what Melvin might have been using it for?

MR. AMMONS: Your Honor, I object to this question as calling for an opinion and—

MRS. CRAMPTON: It doesn't call for his opinion. I asked if he knew of his own knowledge, Your Honor.

A I don't know what he would have used it for.

THE COURT: I'll sustain the objection.

MRS.CRAMPTON: Note our exception.

Q If you used a 410 shotgun for hunting, what would be your primary purpose—What kind of thing would you hunt for?

A I would hunt small game, rabbits, squirrel, or something of similar nature.

THE COURT: I thought we had a stipulation on that.

MRS. CRAMPTON: I thought we stipulated as to the machete.

THE COURT: I think we stipulated as to the shotgun also.

MR. AMMONS: Your Honor, would you instruct counsel to refrain from continuing to pursue this line of questioning, in view of the Court's previous rulings?

THE COURT: Counsel is so instructed.

Q Let me ask you one more thing. If it were not an offense of unlawful possession of a firearm by a felon—or as this ended up in the motion to revoke, as amended—

MR. AMMONS: Your Honor, I object to this because it is a fact it is a violation of the terms of probation—

MRS. CRAMPTON: I object to this statement on the part of the District Attorney because it is our opinion this was not an offense that he was charged with in the State's motion to revoke, and as we urged earlier—

THE COURT: Well, we haven't reached argument stage.

MR. AMMONS: Your Honor, I'll withdraw the objection.

THE COURT: Let's move on.

Q If it were not an offense, as to the one finally entered by the Court, the second phase of Term 1, the one that had to do with the shotgun and the one that had to do with the machete—Would you at least have felt that you would have tried to have contacted Melvin before you would have attempted to revoke his probation? The thing I am getting at is if it is any kind of procedure, if for some reason someone isn't in touch with you, to try to back it up and bring them back in line and so forth?

A Yes, if after a period of time if I have had no contact with a probationer, if I cannot get a letter to him without it being returned or not in touch with him by telephone, nor presonally going to his home or business and contact him, then I will enter a revocation order or a request, on the basis of no report, no payments and no attempt to maintain his probation.

Q But now it is my understanding that you testified you did these things if you were unable to contact them in any of these ways you said?

A Yes.

MRS. CRAMPTON: Pass the witness.

REDIRECT EXAMINATION

BY MR. AMMONS:

Q Mr. Plummer, do you allow your probationers to report by mail?

A Yes, sir.

Q Do very many of your probationers report by mail?

A A large percentage report by mail.

Q Do your records reflect whether or not this defendant ever reported by mail?

A He never reported by mail.

MR. AMMONS: No further questions.

RECROSS EXAMINATION

BY MRS. CRAMPTON:

Q How literate is Melvin, do you know of your own knowledge, Mr. Plummer?

A As far as I know, he is literate. I have no indication that he is illiterate. His handwriting is very neat as far as signing his name and making out the reports.

Q Would you have any idea how far he went in school?

A Yes, ma'am. He went to Rockston, Texas, to the Seventh grade.

Q When would that have been?
A I have no date as to when he dropped out of school.
Q You wouldn't know whether or not he was promoted or dropped out for some other reason?
A No. ma'am, I have no idea as to that.

MRS. CRAMPTON: Pass the witness.

MR. AMMONS: No further questions.

(WITNESS EXCUSED

MRS. CRAMPTON: Your Honor, I would like to continue this hearing—

THE COURT: We have been at this all day and I would like to finish it up if we can possibly do so.

MR. AMMONS: Your Honor, the State rests.

MRS. CRAMPTON: Your Honor, before the defense continues, I would like to move for an instructed verdict of not true and that this motion to revoke be overruled and the defendant be freed from this restraint.

THE COURT: Overruled.

MRS. CRAMPTON: Note our Exception.

* * * * *

MRS. CRAMPTON: We will recall Mr. Plummer to the stand, Your Honor.

MR. WALTER PLUMMER was recalled by the defense and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. CRAMPTON:

Q Mr. Plummer, would you have advised Melvin that

he could not have filed a motion to get off of probation if he had a charge pending against him?
A Would you please say that again?
Q Would you have advised a probationer, Melvin or anyone, any other probationer, that they could not file a motion to get off probation if they had a charge filed against them?
A Yes, I would.

MRS. CRAMPTON: Pass the witness.

MR. AMMONS: No questions.

THE COURT: You may step down.

(WITNESS EXCUSED)

* * * * *

Supreme Court, U. S.
FILED
JUL 15
MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1591

* * *

MELVIN YOUNG,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
ANITA ASHTON
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent

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On Petition For A Writ Of Certiorari
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Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES The State of Texas, Respondent herein, by and through its duly authorized Attorney General, and files this its Brief in Opposition.

QUESTIONS PRESENTED

I. Whether it is a denial of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States for a probation officer to have a greater caseload than that recommended by the Texas Legislature.

II. Whether a probationer's due process rights would be denied by an alleged non-delivery of probation supervision services in return for a judicially mandated fee.

III. Whether the standard of proof applied to Petitioner's revocation of probation was violative of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. The Fourteenth Amendment to the Constitution of the United States.

3. Article 42.12, Texas Code of Criminal Procedure, entitled "Adult Probation and Parole Law". Specifically, the following portions of that statute:

"Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. . . .

* * *

"Sec. 6a. (a) A court granting probation may fix a fee not exceeding $10 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation. . . .

* * *

"Sec. 10. For the purposes of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in the county or counties, if applicable, are authorized, with the advice and consent of the commissioners court as hereinafter provided, to employ and designate the titles and fix the salaries of probation officers, and such administrative, supervisory, stenographic, clerical and other personnel as may be necessary to conduct pre-sentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of probation. . . .

* * *

"It is the further intent of this Article that the caseload of each probation officer not substantially exceed seventy-five probationers. . . ."

STATEMENT OF THE CASE

Melvin Young, Petitioner herein, was convicted of burglary in the 30th District Court of Wichita County, Texas, after entering a plea of guilty. Punishment was

assessed by the court at six years in the Texas Department of Corrections; however, imposition of the sentence was suspended and Petitioner was placed on probation for six years.

Subsequent to his conviction and during the probationary period, on October 31, 1974, the State filed a motion to revoke probation, alleging that Petitioner had violated the terms of his probation. The State filed an amended motion to revoke probation on November 19, 1974.

A hearing was held on November 27, 1974, whereby the trial judge determined that the Petitioner had violated the terms of his probation and revoked the probation.

Petitioner appealed this revocation of probation to the Texas Court of Criminal Appeals, which affirmed the revocation by per curiam opinion. *Young v. State*, No. 50,935 (January 21, 1976).

STATEMENT OF FACTS

At the time Petitioner was granted probation, he was placed under certain terms and conditions by the court. Among these were stipulations that he:

> "(1) Shall commit no offense against the penal laws of this state or any other state or the United States, and shall not be convicted of any offense in violation of the penal laws of this state or any other state or the United States, and shall violate no penal ordinances of any political subdivision of this state or any other state, and shall not be convicted of any offense in violation of the penal ordinances of any political subdivision of this state or any other state.

* * *

> "(9) Shall report in person or in writing to the assigned probation officer in and for Wichita County, Texas, (or his successor in office) at least once each 30 days or as directed by the court or the probation officer.

* * *

> "(12) Shall pay a total of $63.50 for all costs of court incurred herein, including the $25.00 fee for court appointed attorney.
>
> "(13) Shall pay a monthly probation service fee of $8.00 through the Wichita County probation department, with the first payment due on the 16th day of April, 1972, and a like payment due on the same day of each month that this sentence is in effect."

On September 12, 1974, Petitioner was observed by police officers in Wichita County, Texas, traveling at a high rate of speed in a pickup truck. The officers, in two marked police cars, pursued Petitioner for approximately six blocks before one car turned in front of him, thereby forcing him to stop. During the chase, Petitioner ran a red traffic light and made one turn. Both police cars had their lights flashing and one had its siren on. When the officers approached the truck, one of them observed a machete in plain view in the cab of the truck. Petitioner was then placed under arrest for unlawfully carrying a weapon. The officers also saw some shotgun shells on the dashboard and discovered a shotgun behind the seat.

As a result of this arrest, a motion to revoke probation was filed by the State, alleging that Petitioner had violated the terms of his probation, in that he:

"(1) Committed the offense of unlawfully carrying weapons in Wichita County, Texas, Section 46.02, Texas Penal Code, in that on or about September 12, 1974, Defendant had in his possession an illegal knife, to-wit, a machete having a blade of over 5-1/2 inches.

"(2) Failed to report regularly to his probation officer.

"(3) Paid only $11.60 on his court costs of $63.50.

"(4) Paid only $37.00 in probation fees in the last two years and seven months, leaving an arrearage of $248.00."

On November 19, 1974, an amended motion to revoke probation was filed, alleging further that the Petitioner had committed the offense of eluding a police officer on September 12, 1974.

ARGUMENT AND AUTHORITIES

I. Whether It Is A Denial Of Due Process And Equal Protection Under The Fifth And Fourteenth Amendments To The Constitution Of The United States For A Probation Officer To Have A Greater Caseload Than That Recommended By The Texas Legislature.

The Texas Legislature has not required that a caseload be limited to 75 probationers, but merely recommended that each probation officer's caseload not be substantially more than 75. It is patently frivolous for Petitioner to argue that his equal protection rights were violated because his probation officer had a greater caseload than that *recommended* by the Texas Legislature.

It is difficult to perceive how Petitioner's due process rights were violated, since the Constitution of the United States simply guarantees that Petitioner not be denied his liberty without due process of law. The probation revocation process in Texas meets all the due process standards for revocation set forth in *Gagnon v. Scarpelli*, 411 U.S. 788 (1973). All of those requirements were afforded to Petitioner at each step of the probation revocation proceedings. He had (1) written notice of the claimed violations[1]; (2) disclosure of the evidence to be used against him; (3) the opportunity to be heard in person and to present witnesses; (4) a hearing before a neutral and detached magistrate; (5) written findings supported by evidence, relied upon to revoke his probation; and (6) counsel to represent him at all steps of the proceedings. *Cf., Morrissey v. Brewer*, 408 U.S. 471 (1972).

Finally, there has been no showing in this case, nor could there be, that Petitioner was harmed in any manner. The Constitution of the United States does not require the states to maintain probation systems. The theory behind probation is to give a first offender a second chance within the criminal justice system. The State, in providing a probation officer, is not guaranteeing that probation supervision will prevent violations of the conditions of probation and hence revocation of probation. The desire and impetus for compliance with conditions of probation must come from the probationer. It is stretching imagination to

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[1]The state made an oral amendment to the motion to revoke probation at the commencement of the revocation hearing to include the unlawful carrying of a shotgun. However, the Texas Court of Criminal Appeals, in affirming the revocation, did not consider the evidence concerning the shotgun in that there was other evidence sufficient to support the revocation of probation.

believe that, if Petitioner's probation officer had a caseload of 75 probationers, Petitioner would neither have attempted to elude the police nor unlawfully carried a weapon. Under Texas law:

> "[t]he lack of supervision does not justify a violation of the law or the failure to live up to the terms of probation." *Mullins v. State*, 464 S.W.2d 669, 670 (Tex.Crim.App. 1971).

II. A Probationer's Due Process Rights Are Not Denied By The Alleged Non-Delivery Of Probation Supervision Services In Return For A Judicially Mandated Fee.

The proof at his revocation hearing showed that Petitioner had paid a very small portion of the assessed probationary fee. Further, Petitioner had failed to report to his probation officer. The Texas Court of Criminal Appeals did not consider those two alleged violations of probation in affirming the revocation. In fact, the State on appeal conceded that the trial court abused its discretion in finding that the Petitioner had violated the terms of his probation by failing to pay such fees. Therefore, it is difficult to perceive how Petitioner was harmed or how a constitutional question is presented by the alleged non-delivery of probationary supervision after payment of a small portion of the supervisory fees. As previously stated, the alleged lack of supervision, even in light of a few fee payments, cannot justify Petitioner's actions in violating the terms of probation.

III. Findings Based On A Preponderance Of The Evidence Meet The Constitutionally Required Standard Of Proof In Probation Revocation Hearings.

A revocation of probation is an exercise of the broad discretionary power of the trial court. The standard of proof is less than would be required for a conviction, for the question is no longer the guilt or innocence of a defendant, but rather, whether he has complied with the conditions imposed by the court after his initial conviction. The evidentiary standard has been set forth by the United States Court of Appeals for the Fifth Circuit as follows:

> "Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. Probably evidence rising to the level of substantial evidence is not even required, absent arbitrary and capricious action in the revocation. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. United States v. Langley, 438 F.2d 91 (5th Cir. 1970); Manning v. United States, 161 F.2d 827 (5th Cir. 1947). On review, an action of the trial court revoking probation will not be disturbed in the absence of a clear showing of abuse of discretion."
> *United States v. Francischine*, 512 F.2d 827, 829 (5th Cir. 1975), *cert. denied*, ____ U.S. ____, 96 S.Ct. 284 (1975).

In Petitioner's own case, the Texas Court of Criminal Appeals applied the same standard:

> "Appellant challenges the sufficiency of the evidence to support each of the court's findings that appellant violated the terms of his probation in the five respects alleged and found

by the court. Such findings must be based on *a preponderance of the evidence.* Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974).

* * *

"[T]his Court has said that the trial court does not have absolute discretion arbitrarily to revoke probation. Campbell v. State, 476 S.W.2d 918 (Tex.Cr.App. 1970); Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974). The limitation suggested by *Campbell* and *Scamardo,* however, related only to the requirement of some showing of a violation of a condition of probation. That showing has been made in this case. We know of no better office in whom to vest the determination of 'the best interests of society' than of the trial judge, and have been shown no authority that would indicate otherwise. Certainly this Court cannot conclude in the instant case that the trial judge abused his discretion in this regard." *Young v. Texas,* No. 50,935 (Tex.Crim.App., January 21, 1976). (Emphasis supplied.)

In sum, a constitutionally sufficient standard of proof was applied to Petitioner's revocation of probation. Moreover, the proof at Petitioner's revocation hearing clearly showed that he had violated at least one condition of his probation. Therefore, there is no showing that Petitioner was denied due process or equal protection.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General

ANITA ASHTON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, first class, certified and postage prepaid, on this the _____ day of July, 1976, addressed to: Barbara C. Crampton, Attorney for Petitioner, 505 Lamar, Wichita Falls, Texas 76301.

JOE B. DIBRELL, JR.
Assistant Attorney General